JD(NY)-55-04
Cincinnati, OH

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**NEW YORK BRANCH OFFICE**
**DIVISION OF JUDGES**

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW) AND ITS LOCAL NO. 2029**

**and** **Case No. 9-CB-11182**

**NUTONE, INC.**

*Engrid Vaughan, Esq.*, Counsel for the General Counsel.
*Daniel Begian, Esq,* Counsel for the Charging Party.
*Fred Cloppert, Esq.*, Counsel for the Respondent.

## DECISION

## Statement of the Case

**Joel P. Biblowitz, Administrative Law Judge:** This case was heard by me on December 2, 2004 in Cincinnati, Ohio. The Complaint herein, which issued on October 28, 2004[1] and was based upon an unfair labor practice charge filed on August 16 by Nutone, Inc., herein called Nutone or the Employer, alleges that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) and its Local 2029, herein called Respondent or the Union, failed and refused to execute a collective bargaining agreement with the Employer even though the parties had reached a complete agreement on the terms and conditions of employment that were to be incorporated in the agreement, and the Employer requested the Union to execute the agreement. By its refusal to execute the agreement, it is alleged that the Union violated Section 8(b)(3) of the Act.

## Findings of Fact

### I. Jurisdiction

Respondent admits, and I find, that the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

### II. Labor Organization Status

Respondents admit, and I find, that they have been labor organizations within the meaning of Section 2(5) of the Act.

### III. The Facts

The Employer and the Union agree that on June 8, after eleven bargaining sessions, beginning on May 5, the parties agreed on all the terms of a new collective bargaining agreement. When the Employer sent the Union the new agreement to execute, the Union

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2004.

refused to execute it alleging that one provision, Section 19.1, was not as the parties had agreed.

The chief negotiator for the Employer was Michael Linihan, the Employer's labor counsel. Assisting him were Gloria Wrenn and Ken Sutton, the Employer's human resource manager and director of operations. The chief negotiator for the Union was Gerald Lancaster, chairman of the Union's bargaining committee. Assisting him were Wayne Reynolds, an international representative, Russ Abney, the Union president, and Frank Harbaugh and Denise Dixon, bargaining committee stewards.

The Union was certified as the collective bargaining representative of the Employer's production and maintenance employees in 1985. The most recent contract between the parties was effective for the period June 9, 1999 to June 8, 2004. The instant dispute centers around only one provision of that contract, Article 19.1 and the language that was to replace it. Article 19.1 of that agreement states:

> 19.1 The Company will continue to pay the current premiums. It is expressly understood, however, that any increase in the cost of such premiums imposed by the carrier during the term of this agreement is to be incurred by the Company.
>
> These are the rates for the factory POS Plan:

| Plan | Weekly | Monthly Contribution |
|---|---|---|
| Single | $4.99 | $21.66 |
| EE/Spouse | $9.05 | $39.25 |
| EE/Child | $5.82 | $25.23 |
| Family | $30.21 | $130.91 |

The most significant negotiations between the parties involved proposed changes to this article. Because of increased costs of medical insurance, the Employer wanted the employees to pay more for insurance, while the Union didn't want any increase in the employees' contributions.

On May 5, the Employer submitted a proposal to the Union for a one year contract and a number of non-wage changes. Linihan read this proposal, including the change to Section 19.1, verbatim. This proposal, at paragraph 8, states:

> Article 19, Section 19.1, delete current language and revise to read: "Employees shall contribute to the cost of the factory POS plan in the following amounts.
>
> The employee rates for the factory POS plan:

| Plan | Weekly Employee Contribution |
|---|---|
| Single | $10.00 |
| Employee/Spouse | $18.00 |
| Employee/Child | $11.00 |
| Family | $45.00 |

The Union objected to this provision only as far as the employees' contributions were concerned. Linihan described the increased contributions as modest; Lancaster described them as out of line. Linihan testified that between the first bargaining session on May 5 and the final session on June 8, the Union representatives never objected to their proposals to delete the current language of Article 19.1; their only objection was to the increase in employee

contributions. On numerous occasions during bargaining, Lancaster said that he didn't want any change in the amount of employee contributions.

On May 11, the Union submitted a proposal to the Employer. It does not mention Article 19.1, but proposes for Article 19.1A, which provides that the Employer will provide an optional Point of Service Plan on a voluntary basis to current employees, "Delete." Next to this proposal is handwritten: "Agreed. 5/11/04." On that day the Employer submitted additional non-wage proposals, including:

> Article 19, Section 19.1, delete current language and revise to read: "Effective July 1, 2004, employees shall contribute to the cost of the factory POS plan in the following amounts:
>
> | Plan | Weekly Employee Contribution |
> |---|---|
> | Single | $10.00 |
> | Employee/Spouse | $18.00 |
> | Employee/Child | $11.00 |
> | Family | $45.00 |

The Union's proposal at the June 2 bargaining session began, "Everything remains the same in current agreement except as follows" with nine provisions, including, "No increase in Health care premiums." On June 7, the Employer modified its May 5 proposal in a number of areas, including:

> Decrease the Company's prior proposal regarding employee contributions to health care to the following amounts:
>
> a. Single- $8.00 (weekly)
> b. Employee/Spouse- $15 (weekly)
> c. Employee/Child- $9.00 (weekly)
> d. Family- $38.00 (weekly)

The parties reached a "tentative agreement" on the evening of June 8. The summary states: "The parties have agreed on the following terms of a Tentative Agreement which has the full and unanimous unqualified recommendation of the Bargaining Committee. The Bargaining Committee urges the membership to ratify the agreement." There are twenty one provisions listed in this Tentative Agreement. No. 1 states: "The 1999-2004 Collective Bargaining Agreement's terms will remain unchanged except for the modifications noted herein." Only one item listed is relevant herein:

> 10. Article 19, Section 19.1, delete current language and revise to read: Employees shall contribute to the cost of the factory POS plan in the following amounts.
>
> The employee rates for the factory POS plan:
>
> | PLAN | WEEKLY EMPLOYEE CONTRIBUTION |
> |---|---|
> | Single | $4.99 |
> | Employee/Spouse | $9.05 |
> | Employee/Child | $5.82 |
> | Family | $30.21 |

The parties also entered into a Memorandum of Agreement that evening stating: "The Company

accepts the Union's last proposal which calls for maintaining employee insurance contributions at their present levels. In turn, the Union accepts the Company's final offer presented on June 8th, 2004, with the exception noted above."

Linihan was an articulate and totally credible witness. He testified that in addition to the participants noted above, Dan Judy, a federal mediator whom he had requested, was present at the June 8 meeting. Linihan testified that in all the bargaining sessions beginning on May 5, he summarized all of the Employer's proposals and stated whether they had been agreed to or were still unresolved. Several remained unresolved when the June 8 meeting began, including Section 19.1. When they began to discuss Section 19.1 on June 8, the Union representatives said that they had "...no objection to the deletion of the language, but they certainly objected to any increase in health insurance and said they were not interested in any increase in health insurance, and they made that point very clear." Linihan then made another counterproposal on the subject and the Union responded in the same manner as they had previously; that they had no objection to the deletion of the language, but were not interested in any increase in employee contributions for health care. Reynolds then told him that the Union had a final offer for them. If they accepted the offer, it would receive the full and unanimous recommendation from the bargaining committee, and this final offer provided for no increase in health care costs for the employees. Linihan caucused with his client and formulated their final offer. At about 7:15, he presented this final offer to the Union by going over each item. When he got to Section 19.1, he referred to it as Company Proposal 8 as it had appeared in his May 5 proposals, and said, "Our final offer includes Company Proposal 8, but we are willing to even further reduce the amount of increases in health insurance." The Union caucused and, about thirty minutes later, the mediator told Linihan that Reynolds and Lancaster wanted to speak to him and his client. They told him that they would recommend the Employer's final offer as he had presented it if there were no increases in employee contributions to health care. Linihan discussed it with his client and they agreed to it. Linihan then prepared the Memorandum of Agreement set forth above, and it was signed by the parties. He told the Union that he would prepare the tentative agreement for the Union to present to the employees for ratification. At about noon the following day he completed the Tentative Agreement, set forth above, and he called the Union and Lancaster picked it up. Linihan told Lancaster that he wouldn't leave the area until he was sure that it was accurate, and later that day he met Lancaster. When he asked if the Tentative Agreement was accurate, Lancaster said "it was perfect." Lancaster asked him to prepare five hundred copies of the Tentative Agreement to present to the membership for ratification, the Employer prepared these copies and gave them to the Union, and it was ratified by the Union membership.

Linihan testified that he then instructed a representative of the Employer to prepare the final collective bargaining agreement: "I said it's really easy to do, all you really have to do is to take the tentative agreement and it tells you precisely what changes you have to make from the old contract. And she did that." This final agreement was sent to the Union in about late June. In late June or early July, Wrenn told Linihan that the Union was refusing to execute the contract because they felt that Section 19.1 was not as the parties had negotiated. By letter dated July 8, Lancaster wrote to Wrenn:

> This letter is to inform you that the Union is not in agreement with article 19, 19.1 of the current agreement. In contract negotiations, the union made it clear, in order to ratify a one-year agreement, the insurance had to remain unchanged. The union never agreed to change article 19, 19.1 of the 1999-2004 contract.
>
> On June 13, 2004, the union held a meeting to present to the membership the changes in the current agreement. No change in article 19, 19.1, was instrumental in getting the

> proposal ratified. The current language from the 1999-2004 contract was never meant to change.
>
> Please inform the union if the company plans to print the current contract with the change of language as is or intends to change to the current language of the 1999-2004 contract.

After hearing from Wrenn about Lancaster's allegations, and reviewing his notes of the events of June 8, Linihan prepared the following letter dated July 19, for Wrenn to Lancaster, setting forth the events of June 8, when the parties agreed on the terms of the new agreement, and stating, *inter alia*:

> Again, in accordance with the clear understanding of the parties, Mr. Linihan prepared a Tentative Agreement between the Company and the Union on the morning of June 9, 2004. That Tentative Agreement set forth in explicit terms (which were memorialized in bold) that "...the parties have agreed on the following terms of a Tentative Agreement which has the full and unanimous unqualified recommendation of the Bargaining Committee..." Included in that Tentative Agreement were items 10 and 11 dealing with Section 19.1. Not only do those items 10 and 11 explicitly set forth the language which should be included in Section 19.1, but Mr. Linihan delayed his departure from Cincinnati in order to give the Union an opportunity to review the Tentative Agreement and to acknowledge that it was correct. You appeared at the Company premises later in the day and acknowledged to Mr. Linihan and to others that in fact the terms of the Tentative Agreement were precisely that to which the parties had agreed.
>
> Under these circumstances the Company is going to insist that you sign the Agreement that you reached with the Company in negotiations, a copy of which has been furnished to you. Please return two (2) fully executed copies to me not later than July 26, 2004. I will then have them executed by appropriate Company officials and will, at that point, return a fully executed copy to you. While the Company does not want to be difficult concerning this matter, it has a right to expect the Union to honor the agreements which it reached, and in this case, we will insist that it do so.

On August 4, Linihan called Lancaster and asked him if he was going to sign the new agreement, and Lancaster said that he wasn't. When Linihan asked him why, Lancaster said, "Because we think it should be the language from the old agreement." On that same day, Linihan wrote to international representative Reynolds, *inter alia*:

> This will confirm our telephone conversation of this morning in which I asked you to explain the reasons why the Union is refusing to sign the NuTone Collective Bargaining Agreement. As I understand your position, you do not believe you agreed to the changes the Company has incorporated into the contract regarding Article 19.1, a copy of which has previously been presented to you. Rest assured, NuTone does not wish confrontation with the UAW over this issue, but because the contract previously tendered does, in fact, represent precisely that to which the parties have agreed, it will insist that you execute a contract containing the language presented to you by the Company.

Linihan than summarized the events of June 8 and 9, as he had done in Wrenn's letter to Lancaster, and concluded:

> Under these circumstances, I do not believe there can be any legitimate argument

> concerning Section 19.1. Consequently, the Company is going to insist the Union sign the contract to which it has agreed. As noted previously, NuTone does not wish a dispute with the UAW over this issue, but both parties have the right to expect the other to honor agreements which have been reached in negotiations. As the Company has previously indicated to you, in this case, it will insist that the UAW do so.

By letter dated August 10, Reynolds responded to Linihan:

> In response to your facsimile dated August 4, 2004, as I explained during our telephone conversation the same day, the Collective Bargaining Agreement presented by the Company as being ready for the Union to sign off on, does not reflect what was negotiated at the bargaining table.
>
> The Union will sign off on the Collective Bargaining Agreement if the language in the first paragraph of Article 19.1 is changed back to the language in the prior Agreement.

Lancaster testified that after receiving the Tentative Agreement prepared by Linihan on about June 9, he went over the agreement with the Union's Bargaining Committee and then notified the Employer to make copies of the Tentative Agreement for the Union to present to the membership for ratification at a June 13 meeting. He testified that at the meeting "...we went through each and every change and we did identify that these are changes to the current contract, which was the '99 to 2004 agreement, and these were just the changes and everything else stayed as is except for this right here." The members voted to approve the agreement and Lancaster called the Employer the same day to tell them of the ratification. The next step is that the Employer takes the prior agreement, together with the agreed upon changes and prints a complete new contract, first sending the draft to the Union. After the Union received the draft of the complete agreement from the Employer, Lancaster called Wrenn on July 7 and told her: "That Article 19, Section 19.1 needed to be put in there as negotiated, the verbiage in there on the first two sentences. Everything else was correct." Wrenn said that she would speak to Linihan and the above referenced letters followed. Lancaster testified that at the negotiating sessions commencing on May 5, Linihan read all of the Employer's proposals, including those relating to Section 19.1, but there was no discussion about the proposed language. All the discussion was about the amounts that the employees would have to contribute, and that was the final subject that was resolved on June 8. He testified that the Union refused to sign the agreement because, "the Employer failed to put the first two sentences back in 19.1 because we had not negotiated that out." The disputed sentences are:

> The Company will continue to pay the current premium. It is expressly understood, however, that any increase in the cost of the premium imposed by the carrier during the term of the agreement is to be incurred by the Company.

Lancaster testified that he has been involved in the negotiation of about four contracts and knows the meaning of the word "delete." In fact, there were other deletions agreed to by the parties on June 8 that the Union did not subsequently disagree with. He also testified that at the first bargaining session on May 5, Linihan read the Employer's proposals, including number 8, which states: "Article 19, Section 19.1, delete current language and revise to read:' Employees shall contribute to the cost of the factory POS plan in the following amounts...'" Linihan also read from the Employer's proposals on May 11 that included number 49: "Article 19, Section 19.1, delete current language and revise to read: 'Effective July 1, 2004, employees shall contribute to the cost of the factory POS plan in the following amounts...'"

In October, the Union sent to the Employer a contract that it claimed was the agreed

upon contract for execution. This proposed agreement contains the two sentences that were deleted in the Employer's proposed agreements and the Tentative Agreement, but does not contain the sentence: "Employees shall contribute to the cost of the factory POS plan in the following amounts," although it does provide for the amount of contributions. Lancaster testified that this omission was a mistake on the Union's part.

## IV. Analysis

It is alleged that the Union violated Section 8(b)(3) of the Act herein by refusing to sign the contract that the Employer sent to it in about late June. Counsel for the General Counsel and counsel for the Employer argue that the change to Article 19.1 was clear: the entire article was to be deleted, to be replaced by: "Employees shall contribute to the cost of the factory POS plan in the following amounts. The employee rates for the factory POS plan...[with the weekly employee contribution for single, employee/spouse, employee/child and family coverage.]" The Union, however, argues that the language to be deleted was not the first two sentences of Article 19.1 ("The Company will continue to pay...is to be incurred by the Company."), but rather was the following sentence: "These are the rates for the factory POS plan" together with the rates for the four categories. Counsel for the Union's brief states:

> In effect, the proposal was to delete the contribution table and the one sentence immediately preceding, and replace that language with the language in the tentative agreement. There is no basis for concluding that the "delete" and "revise" language was intended to delete the completely unrelated language in the first paragraph of the Section.

In support of this argument, counsel argues that the record establishes that there was no discussion during negotiations of the first two sentences of Article 19.1 or their deletion: "This lack of discussion regarding the removal of such important language indicates that the parties never intended to remove the language." He further argues that, during negotiations, the Union continually insisted that it would not agree to any new contract that required the employees to pay increased contributions for medical insurance, which the deletion of the first two sentences of Article 19.1 might accomplish. Although, at first glance, this argument appears persuasive, upon a fuller review it must be rejected for a very simple reason: there was no reason to delete the contribution table together with the sentence preceding it and replace it with the new language, as there was no change in the employees' contributions. The only reasonable interpretation of the Employer's proposals on Article 19.1, and the language of the Tentative Agreement agreed to and ratified by the Union, is to delete the entire provision, including the first two sentences, and replace it with the contribution table and the sentence preceding it.

I credit Lancaster that he was unaware that this was the result of the Union agreeing to the Tentative Agreement. However, that is no defense to the Union's refusal to execute the agreement when it was presented to the Union by the Employer. Although a contract may be avoided on the ground of mutual mistake, that is not present herein. As the administrative law judge stated in *Health Care Workers Union, Local 250, SEIU*, 341 NLRB No. 137, at p. 4 (2004):

> ...a party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake and acts in perfect good faith.

The Employer engaged in no misrepresentation during the negotiations herein and there is no ambiguity in the word "delete." I find that it means what it says, that the first two sentences of Article 19.1 are deleted from the new contract, and the fact that the Union may have

misunderstood the meaning of the change does not excuse it from executing the agreement. By refusing to execute the agreement, the Union violated Section 8(b)(3) of the Act.

## Conclusions of Law

1. The Employer has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondents have been labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees including inspectors and group leaders employed at the Employer's Cincinnati, Ohio facility. But excluding all other employees, included, but not limited to, the following: Executives, managerial employees, confidential employees, professional employees, guards, watchmen, and supervisors as defined in the Act, technical employees, plant clerical employees and office clerical employees.

4. By refusing to execute the agreed upon collective bargaining agreement tendered to it by the Employer in June 2004, the Respondent violated Section 8(b)(3) of the Act.

## The Remedy

Having found that the Respondent violated Section 8(b)(3) of the Act by failing and refusing to execute the collective bargaining agreement agreed to by it and the Employer on June 8, 2004, I shall recommend that the Respondent cease and desist from engaging in certain activity and take certain affirmative action to effectuate the policies of the Act, to execute the agreement that it reached with the Employer on June 8, 2004.

On these findings of fact and conclusions of law, I issue the following recommended[2]

## ORDER

The Respondent, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), and its Local 2029, its officers and agents, shall

1. Cease and desist from

(a) Refusing to execute the collective bargaining agreement agreed to by the Employer and the Respondent on June 8, 2004.

(b) In any like or related manner interfering with, restraining or coercing employees in the

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Execute the agreement that it reached with the Employer on June 8, 2004.

(b) Within 14 days after service by the Region, post at its union office in Cincinnati, Ohio copies of the attached Notice marked "Appendix."[3] Copies of the Notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since June 8, 2004.

(c) Sign and return to the Regional Director sufficient copies of the Notice for posting by Nutone, Inc., if willing, at all places where Notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**Dated, Washington, D.C.**

_____

**Joel P. Biblowitz**
**Administrative Law Judge**

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

## NOTICE TO MEMBERS

**Posted by Order of the**
**National Labor Relations Board**
**An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

**WE WILL NOT** refuse to sign the contract that we agreed to at our final bargaining session with Nutone, Inc. on June 8, 2004.

**WE WILL NOT** in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE WILL** sign the contract that we agreed to with Nutone, Inc. on June 8, 2004.

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW) AND ITS LOCAL NO. 2029**

**Dated**_____ **By**_____
**(Representative)** **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.